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ATTORNEYS FOR APPELLANTS:

JACK C. BIRCH
RANDALL L. MORGAN
Snyder Birch & Morgan
Syracuse, Indiana

ATTORNEY FOR APPELLEES:

JAMES S. BUTTS
Law Office of James S. Butts, P.C.
Warsaw, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

FLORENCE A. HORN, individually, and)
FLORENCE A. HORN as Trustee of the)
FLORENCE A. HORN REVOCABLE TRUST,))

Appellants-Defendants,)

vs.)

CARL D. OUSLEY and JANET OUSLEY,)

Appellees-Plaintiffs.)

No. 43A05-0512-CV-751

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-0412-PL-915

October 18, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Florence A. Horn, individually and as Trustee of the Florence A. Horn Revocable Trust, (Horn) appeals a judgment for specific performance in favor of Carl and Janet Ousley, regarding the sale of eighty-six acres of real estate owned by Horn. Horn presents the following restated issues for review:

1. Did the trial court err in determining that an enforceable contract existed and that specific performance of said contract was appropriate?
2. Did the trial court err in adding terms to the contract?

We affirm.

The facts most favorable to the judgment reveal that in 1978, Horn and her now-deceased husband, Owen Horn, owned a 101-acre tract of real estate in Kosciusko County, Indiana. On August 8, 1978, the Horns entered into a Conditional Sales Contract for Sale of Real Estate (the 1978 Contract) with the Ousleys, pursuant to which they sold fifteen acres of their real estate to the Ousleys on contract. On April 17, 1979, the Ousleys satisfied their payment obligations under the 1978 Contract, and the Horns conveyed title to the fifteen acres to the Ousleys by warranty deed. Owen Horn died on November 26, 1989. Thereafter, Horn conveyed title to the remaining eighty-six acres of real estate, as well as additional real estate, to herself as trustee of a revocable trust.

The eighty-six acres of adjacent real estate retained by the Horns (the Real Estate) is the subject matter of the current dispute.¹ Paragraph 12 of the 1978 Contract provided:

12. RIGHT TO PURCHASE

It is agreed that the [Ousleys] shall have the first right to purchase any part of the balance of the real estate owned by the [Horns] and lying adjacent to the above described premises at some future time in the event it should be for sale.

Appellant's Appendix at 136. On several occasions since Owen's death, Horn considered selling the Real Estate. In 1997 and then again in 2002, Horn entered into negotiations with the Ousleys in an attempt to sell the Real Estate or a portion thereof. The parties, however, could not reach an agreement on price.

On September 24, 2004, Horn's attorney, Vern Landis, sent a letter to the Ousleys by certified mail. The letter, which was signed by Landis, provided in relevant part as follows:

Dear Mr. and Mrs. Ousley:

Please be advised that this firm represents Florence A. Horn. Our client has asked us to contact you regarding the Contract for Sale of Real Estate between you and Mrs. Horn and her deceased husband dated August 8, 1978. That contract contains a provision that appears to give you the first right of refusal to purchase the balance of the real estate owned by Mrs. Horn and lying adjacent to the property you have already purchased from our client. While we believe that first right of refusal expired when your contract with Mrs. Horn was paid off, the purpose of this letter is to advise you that Mrs. Horn does now intend to sell the property lying adjacent to the property you purchased from our client pursuant to the Contract for Sale of Real Estate dated August 8, 1978.

The sale price for this property will be \$2,500.00 per acre for 86 acres for a total price of \$215,000.00, which would be payable in full at closing.

¹ The eighty-six-acre tract is contiguous on three sides to the fifteen-acre tract previously purchased by the Ousleys.

Please be advised that you have 20 days from the date of this letter to advise the undersigned whether you will exercise your first right of refusal. If you do not do so, our client will proceed to sell the real estate as she sees fit.

Please direct any correspondence regarding this matter to the attention of the undersigned, and do not contact Mrs. Horn directly regarding this matter.

Id. at 41-42.

The Ousleys discussed the letter and thought about it for a few days. Carl then called Horn and asked if she was serious about selling this time. Horn responded affirmatively but directed him to contact Landis, not her. Carl informed her that he would “proceed and get the money.” *Transcript* at 15. After obtaining a loan commitment from Farm Credit Services for the amount of money he needed to purchase the Real Estate, Carl contacted Landis and scheduled an appointment to meet with him. The Ousleys met with Landis in his office on October 11, 2004, informed him that they had secured loan approval, and provided him with said documentation. Landis and Carl agreed that it would be a “fairly simple, straight forward, real estate transfer.” *Id.* at 18. Landis told the Ousleys that he would prepare the final paperwork so that they could take it to their lender. Although still awaiting a formalized contract from Landis, the Ousleys left the meeting believing that an agreement had been reached regarding the sale of the Real Estate.

By letter dated October 19, 2004, however, Landis advised the Ousleys: “Mrs. Horn has decided that she does not want to sell the subject property at this time.” *Appellant’s Appendix* at 45. Claiming that the September 24, 2004 letter constituted an

offer to sell the Real Estate and that said offer was accepted at the meeting with Landis on October 11, the Ousleys demanded that Horn sell the Real Estate to them for \$215,000.00 pursuant to the terms of her offer.² When Horn failed or refused to proceed with the sale, the Ousleys filed a complaint on December 2, 2004, seeking specific performance of the contract.³

Following a bench trial, the trial court entered its Judgment for Specific Performance on November 30, 2005. Upon the Ousleys' tender of the purchase price, the trial court specifically ordered Horn to deliver at closing "a proof of merchantable title and a good and sufficient Trustee's Deed" conveying the Real Estate to the Ousleys. *Id.* at 8. The trial court further ordered Horn to pay "the normal sellers' expenses in connection with the conveyance of the above-described real estate, including therein expenses for title insurance, real estate taxes prorated to the date of closing, and other normal and customary expenses paid by sellers in this community in connection with the sale of real estate." *Id.* at 10. Horn now appeals.

² By letter dated November 2, 2004, the Ousleys' attorney notified Landis in part:

Mr. and Mrs. Ousley are now making demand that Mrs. Horn proceed forward with the sale of the real estate to them. They are ready, willing, and able to purchase the real estate pursuant to the terms of Mrs. Horn's offer and are prepared to close upon reasonable notice. If I have not received a response to this offer agreeing to scheduling (sic) a closing date on or before November 15, 2004, my clients have instructed me to file a complaint for specific performance of this contract.

Id. at 48.

³ We note that Horn filed a counterclaim, which the trial court decided adversely to her. The trial court's ruling in this regard is not challenged on appeal.

We initially observe that the trial court entered findings of fact and conclusions thereon pursuant Horn's request and Ind. Trial Rule 52(A). Our two-tiered standard of review of such an order is well settled.

We may not set aside the findings or judgment unless they are clearly erroneous. In our review, we first consider whether the evidence supports the factual findings. Second, we consider whether the findings support the judgment. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. We give due regard to the trial court's ability to assess the credibility of witnesses. While we defer substantially to findings of fact, we do not do so to conclusions of law. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment.

Gabriel v. Windsor, Inc., 843 N.E.2d 29, 44 (Ind. Ct. App. 2006) (some citations omitted).

1.

Horn contends that the trial court erred in determining that a valid and enforceable contract existed and in ordering specific performance of the alleged contract. Horn argues that even assuming the September 24, 2004 letter constituted a valid offer, the Ousleys failed to establish "a proper and complete acceptance of all of the terms of such letter by the October 14, 2004 deadline imposed therein." *Appellant's Brief* at 15. Horn further contends that the trial court erred in ordering specific performance because the letter was merely a "solicitation of an offer as part of a process to negotiate an actual contract". *Id.* at 12. In this regard, she asserts that "[i]n addition to several negotiated provisions that the parties would have expected in any true contract for the sale of the

Real Estate, the [letter] failed to include as an essential contract term any closing date to consummate the potential sale of the Real Estate.” *Id.* at 15.

We turn first to the issue of acceptance. Horn claims that the Ousleys failed to offer sufficient evidence that they “expressly advised [Landis] that the terms of the September 24, 2004 letter were accepted without any modification.” *Appellant’s Brief* at 14. In this regard, she notes that the Ousleys had only secured financing for \$208,075.00. We reject Horn’s invitation to reweigh the evidence or judge witness credibility. The evidence favorable to the judgment, as well as the reasonable inferences drawn therefrom, supports the trial court’s finding that the Ousleys verbally communicated their acceptance to Landis (Horn’s authorized agent) during their meeting on October 11, 2004.⁴ While it is true that the Ousleys expected Landis to prepare a formal written contract, this does not establish that a binding agreement had not already been reached. *See Wolvos v. Meyer*, 668 N.E.2d 671 (Ind. 1996) (reference to the future execution of a more formalized real estate contract does not void a presently existing agreement made by the exercise of a real estate option); *see also Epperly v. Johnson*, 734 N.E.2d 1066, 1071 (Ind. Ct. App. 2000) (“parties may make an enforceable contract that binds them to prepare and execute a final subsequent agreement”). In fact, upon leaving the meeting with Landis, Janet had no question that an agreement had been reached regarding this simple real estate transaction. The trial court’s finding regarding the Ousleys’ acceptance is supported by the evidence and is not clearly erroneous.

⁴ There is simply no merit to Horn’s implied assertion that the Ousleys may have offered only \$208,075.00 for the Real Estate.

Now to the heart of Horn's appeal. That is, she claims that the trial court erred in granting specific performance because the contract as expressed in the letter was so incomplete with respect to essential terms that it was unenforceable.

Specific performance is an equitable remedy that the trial court may grant in its sound discretion. *Gabriel v. Windsor, Inc.*, 843 N.E.2d 29. The grant of specific performance directs the performance of a contract according to the terms agreed upon. *Id.* Therefore, to be specifically enforced, the terms of the contract should be precise so that neither party could reasonably misunderstand them. *Wolvos v. Meyer*, 668 N.E.2d 671. "Enforcement of a writing which is incomplete or ambiguous creates the substantial danger that the court will enforce something neither party intended." *Id.* at 675. Only essential terms, however, need be included in order to render a contract enforceable. *Wolvos v. Meyer*, 668 N.E.2d 671; *Illiana Surgery & Med. Ctr., LLC. v. STG Funding, Inc.*, 824 N.E.2d 388 (Ind. Ct. App. 2005). All that is required is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom. *Wolvos v. Meyer*, 668 N.E.2d 671; *Johnson v. Sprague*, 614 N.E.2d 585 (Ind. Ct. App. 1993). While absolute certainty in all terms is not required, courts cannot supply missing, essential terms.⁵ *Johnson v. Sprague*, 614 N.E.2d 585.

⁵ Pursuant to the Statute of Frauds, Ind. Code Ann. § 32-21-1-1 (West 2002), an enforceable contract for the sale of land must be evidenced by a writing:

- (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent; (2) which describes with reasonable certainty each party and the land; and, (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom the promises were made.

Johnson v. Sprague, 614 N.E.2d at 588. Here, as in *Johnson*, the issue would be with respect to the third criterion. We observe, however, that Horn does not address the Statute of Frauds on appeal. Whether the issue arises under the Statute of Frauds or general principles of specific performance, the analysis appears

As set forth above, Horn claims that the contract is unenforceable because it lacks several terms. In particular, she emphasizes that her letter failed to include a closing date, which she claims is an essential contract term. She further notes that the letter failed to include other important terms relating to matters such as real estate taxes, title insurance, and survey requirements.

In *Johnson*, the appellant argued that a short memorandum signed by the parties did not contain sufficient terms to constitute an enforceable contract for the sale of real estate. She specifically claimed that the agreement failed to include, among other things, terms relating to real estate taxes, the common-area maintenance fee, and who would prepare the deed and provide evidence of title. This court, however, concluded that the missing terms were not essential to the real estate contract. *Johnson v. Sprague*, 614 N.E.2d 585.

With respect to real estate taxes, the court acknowledged that this term is customarily negotiated between the parties and included in a contract for the sale of real estate. In the context of a typical real estate transfer where closing and delivery of title is planned in the proximate future,⁶ however, the court held that “an agreement on the

to be the same in this regard (that is, enforceability is determined based upon whether the contract/writing lacks essential terms). See *Wolvos v. Meyer*, 668 N.E.2d 671 (in a case involving the issue of specific performance, the Supreme Court relied extensively on *Johnson v. Sprague*, 614 N.E.2d 585, which addressed the third criterion of the Statute of Frauds).

⁶ In *Workman v. Douglas*, 419 N.E.2d 1340 (Ind. Ct. App. 1981), this court determined that a provision for the payment of real estate taxes was an essential missing term. The *Johnson* court, however, easily distinguished *Workman* because that case involved an alleged installment sale with monthly payments over a term of twenty-five years. On the other hand, like the instant case, *Johnson* did not involve an installment sale but rather a closing and transfer of title “in the proximate future.” *Johnson v. Sprague*, 614 N.E.2d at 589.

payment of real estate taxes is not an essential term which must be expressed by the parties.” *Id.* at 589. Rather, the court explained that the law provides the missing term.

As a general rule, all applicable law in force at the time an agreement is made impliedly forms a part of the agreement without any express statement to that effect. Absent an agreement to the contrary, there is a presumption that the buyer will receive good title and that the seller will convey the fee simple title by a general warranty deed. Under IND.CODE § 32-1-2-12,^[7] that conveyance would be “free from all encumbrances,” including the lien of real estate taxes.... Unless the parties otherwise agree, a conveyance of the fee simple title by warranty deed implies that the seller is responsible for all real estate taxes which are a lien on the day of closing. The parties usually negotiate and agree upon the allocation of responsibility for real estate taxes, but the law will imply an agreement where none is made. Therefore, an agreement concerning the payment of real estate taxes was not essential to the parties’ contract, and the absence of such an agreement does not render the contract invalid.

Id. (citations omitted and footnote supplied); *see also* *Wolvos v. Meyer*, 668 N.E.2d at 676 (“[a]bsent an agreement to the contrary, there is a presumption that the buyer receives title by general warranty deed,...free of any encumbrances[, and]...the seller is responsible for any taxes and other obligations incurred prior to the date of sale”).

The *Johnson* court similarly found that the failure to include a provision regarding who would prepare the deed and provide evidence of title was not fatal to enforcement of the contract. In this regard, the court stated:

[I]f there is no express agreement, it is well-settled as a matter of common and actual practice that the responsibility for providing a good and sufficient warranty deed and proof of title belongs with the seller. The seller brings good title and evidence thereof to the closing table in consideration for the purchase money.

⁷ Now Ind. Code Ann. § 32-17-1-2(b)(4) (West 2002).

Johnson v. Sprague, 614 N.E.2d at 590. Recognizing a distinction between essential terms and collateral terms, the court concluded that while the documents the parties signed could have been more complete, they were sufficient to form an enforceable real estate contract. *Johnson v. Sprague*, 614 N.E.2d 585.

In the instant case, Horn notes that “important terms” regarding real estate taxes, title insurance, and survey requirements were not included in the letter. *Appellant’s Brief* at 12. While she does not actually claim that these terms were essential to a contract for the sale of the Real Estate, she asserts that one would expect that these terms would have been negotiated and included in any “true contract for the sale of the Real Estate.” *Id.* at 15. The fact that a typical real estate contract would include these provisions, however, does not in itself render a contract that lacks such terms unenforceable. *See Johnson v. Sprague*, 614 N.E.2d 585; *Wolvos v. Meyer*, 668 N.E.2d at 678 (non-essential matters, even if customarily included in a contract, “may be left open for future specification without destruction of the contract or depriving a party remedy for its enforcement”) (quoting *Ray v. Wooster*, 270 S.W.2d 743, 752 (Mo. 1954)). Horn reluctantly appears to recognize that these are not essential terms.

On the other hand, Horn claims that a closing date is an essential term. Therefore, boiled down, her argument on appeal is that no enforceable contract existed because the letter failed to include a precise closing date. We cannot agree that this is fatal to the enforcement of the contract.

In affirming the order of specific performance, the *Johnson* court stated:

The Memorandum correctly identified the parties, the real estate, the purchase price *and the closing date*, and it included Johnson's signature. The offer to purchase was accompanied by a check as down payment for the purchase price and identified as such. These documents are sufficiently definite to constitute an enforceable contract under the Statute [of Frauds].

Johnson v. Sprague, 614 N.E.2d at 590 (emphasis supplied). This language was cited with approval by our Supreme Court in *Wolvos v. Meyer*, 668 N.E.2d 671, a case which clearly implies that a closing date is an essential term in a real estate contract. In both *Johnson* and *Wolvos*, however, the written agreements expressly included a closing date or time frame in which closing was to be completed. Therefore, neither court was called upon to determine whether the absence of a closing date is necessarily fatal to the enforceability of an alleged contract.

In this context (that is, specific performance of an agreement for the sale of real estate), we have previously declared, "the time and place of performance are not always necessary terms of a valid memorandum, because in their absence the law supplies these by implication". *Block v. Sherman*, 109 Ind. App. 330, 34 N.E.2d 951, 955 (1941); *see also Ray v. Wooster*, 270 S.W.2d at 751 ("[w]here time of performance is not made the essence of the contract an ambiguity in that respect will not defeat specific performance"). Absent an express agreement on a time for performance, the law supplies the missing term and implies that the closing of the transaction will be held within a reasonable time. *Block v. Sherman*, 109 Ind. App. 330, 34 N.E.2d 951; *see also Harrison v. Thomas*, 761 N.E.2d 816, 819 (Ind. 2002) ("[w]hen the parties to an agreement do not fix a concrete time for performance, the law implies a reasonable time"); *Epperly v. Johnson*, 734 N.E.2d 1066.

Moreover, we observe that in this particular case the offer expressed in the letter was explicitly left open for only twenty days. Thus, it is apparent that time was of the essence and, upon acceptance of the offer within that time period, the parties intended the closing to take place in the proximate future, at which time the Ousleys would pay the contract amount in full. Under the specific circumstances of this case, we conclude that a provision designating a precise closing date was not essential and the law will supply the missing term.

In this case, the agreement was complete in its essential terms with respect to the sale of the Real Estate. Therefore, the trial court did not abuse its discretion by enforcing the contract through specific performance.

2.

Horn further argues that the trial court erred in adding terms to the contract. In this regard, she claims the trial court erroneously imposed an obligation on Horn to pay certain expenses, such as title insurance, which were not referenced in the contract.

In its order of specific performance, the trial court ordered Horn to pay the “normal sellers’ expenses in connection with the conveyance of the [Real Estate], including therein expenses for title insurance, real estate taxes prorated to the date of closing, and other normal and customary expenses paid by sellers in this community in connection with the sale of real estate.” *Appellant’s Appendix* at 10.

The trial court’s order is not clearly erroneous with regard to title insurance and real estate taxes. *See Johnson v. Sprague*, 614 N.E.2d 585 (absent agreement to the contrary, it is implied that the seller is responsible for all real estate taxes which are a lien

on the day of closing and that the seller will bring good title and evidence thereof to the closing table); *see also Wolvos v. Meyer*, 668 N.E.2d 671 (concluding that provisions relating to, inter alia, title insurance, surveys, inspections, and real estate taxes, were not essential to the real estate contract).

With respect to non-essential terms, our Supreme Court has stated:

If costs remain which are not specified in such forms,...the party responsible for the costs can be determined by whether the costs must be incurred before or after transfer of title, so that title can be conveyed free of all encumbrances.

Wolvos v. Meyer, 668 N.E.2d at 677. Here, it is not clear what expenses are included by the trial court's reference to "other normal and customary expenses paid by sellers in this community in connection with the sale of real estate."⁸ *Appellant's Appendix* at 10. We, however, affirm this portion of the order to the extent said "other expenses" must be incurred before transfer of title so that title can be conveyed free of all encumbrances. *See Wolvos v. Meyer*, 668 N.E.2d 671.

Judgment affirmed.

BARNES, J., and MATHIAS, J., concur.

⁸ Horn does not directly address this general portion of the order, as her argument focuses on the trial court's specific references to real estate taxes and title insurance.